

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
Amendment of Parts 2 and 25 of the)	
Commission's Rules to Permit Operation of)	
NGSO FSS Systems Co-Frequency with)	
GSO and Terrestrial Systems in the Ku-Band))	ET Docket No. 98-206
Frequency Range;)	RM-9147
)	RM 9245
Amendment of the Commission's Rules to)	
Authorize Subsidiary Terrestrial Use of the)	
12.2-12.7 GHz Band by Direct Broadcast)	
Satellite Licensees and Their Affiliates; and)	
)	
Applications of Broadwave USA, PDC)	
Broadband Corp., and Satellite Receivers,)	
Ltd., to Provide a Fixed Service in the 12.2-)	
12.7 GHz Band)	
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To: The Commission

**REPLY COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION
OF AMERICA, LEADERSHIP CONFERENCE ON CIVIL RIGHTS,
CENTER FOR MEDIA EDUCATION, THE LEAGUE OF
UNITED LATIN AMERICAN CITIZENS
AND THE MEDIA ACCESS PROJECT**

Consumers Union,¹ the Consumer Federation of America², the Leadership
Conference on Civil Rights,³ the Center for Media Education,⁴ the League of United

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* (with approximately 4.5 million paid circulation) regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

Latin American Citizens⁵ and the Media Access Project⁶ (CU, *et al.*) respectfully submit the following reply comments to the *Further Notice of Proposed Rulemaking*, FCC No. 00-418 (released December 8, 2000) (*Further Notice*) in the above referenced docket. CU, *et al.* seeks to respond largely to the comments filed by AT&T, the two DBS providers, their affiliates and their trade association (collectively, "incumbent MVPDs").⁷

CU, *et al.* urge the Commission to grant the license and waiver applications of Northpoint and its Broadwave Affiliates ("Northpoint") to provide a terrestrial wireless broadband video and data service on the 12.2-12.7 GHz band. The public interest will be best served by prompt approval Northpoint's applications to provide a terrestrially-based Multichannel Video Programming Distribution ("MVPD") service that will bring instant competition and rapid deployment of broadband services to the entire country, including unserved and underserved rural and urban areas. The authorization of a new Multichannel

² The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over two hundred and forty state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.

³ The Leadership Conference on Civil Rights (LCCR) is the nation's oldest, largest and most diverse civil and human rights coalition, with more than 180 national organizations committed to the protection and advancement of basic civil and human rights for all persons in our society. Founded in 1950, the LCCR's advocacy includes issues affecting persons of color, women, children, organized labor, major religious groups, persons with disabilities, gays and lesbians, and the elderly.

⁴ The Center for Media Education (CME) is a national nonprofit organization that educates the public about critical media policy issues. CME works with a broad coalition of education, health, and child advocacy groups working to promote a quality media culture for children, their families, and their communities.

⁵ The League of United Latin American Citizens (LULAC), chartered in 1925, presently with over 800 local LULAC councils throughout the nation, is the oldest and largest national Latino membership organization. Through its extensive grass roots membership, LULAC promotes programs to improve the quality of life at the local and national levels.

⁶ The Media Access Project is a non-profit telecommunications law firm, working to protect the public's right to receive information from diverse sources through electronic media.

⁷ They include DirectTV, Echostar, the National Rural Telecommunications Cooperative ("NRTC"), the Satellite Broadcasting and Communications Association ("SBCA") and Pegasus Broadband Corporation.

Video and Data Distribution Service ("MVDDS") and possible auctions would delay and possibly undermine the expansion of competition to incumbent cable and satellite companies.

It is essential for the Commission to focus on the environment within which Northpoint is attempting to gain a license. This context is that 1) Congress has eliminated price regulation of the cable industry even though the Commission has consistently found virtually no price competition in the MVPD market, 2) rate increases for cable have been nearly three times the rate of inflation since the enactment of the law designed to promote more competition in all communications markets, the 1996 Telecommunications Act, 3) the FCC has demonstrated that DBS is not disciplining cable prices and 4) while the FCC has found that wireline MVPD competition through telephone companies, or other system overbuilders are not increasing. With this as backdrop, it is difficult for us to imagine a potential licensee that could make a stronger public interest showing warranting its license. Northpoint brings to the table the prospect of immediate competition, an immediate increase of minority ownership in the MVPD marketplace, and immediate deployment of advanced services to rural and underserved areas. We ask the Commission to reject the incumbents' claims that the public interest would best be served by embarking on a lengthy new process that may not lead to more MVPD competition, and instead grant Northpoint's license without delay.

INTRODUCTION AND SUMMARY

As the Commission has consistently recognized, "[s]uccess in the marketplace...should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs--and not by strategies in the regulatory arena."

AT&T Comments at 5.

CU, *et al.* wholeheartedly agree with this statement, but unlike AT&T, we believe that it is the incumbent MVPDs who are playing the regulatory games. The Commission must take the opposition to Northpoint's applications and the subsequent support for auctions for what it really is - an attempt by incumbent MVPDs to misuse governmental processes to delay and eventually destroy a low cost, innovative competitive broadband MVPD service. Once the victims of cable operators' attempts to block their service, the two DBS providers now employ similar tactics in seeking governmental protection for their duopoly. The Commission should not allow a legitimate license distribution process for new spectrum—auctions—to be misused for anticompetitive purposes in this secondary licensing proceeding.

That the incumbent MVPDs are seeking to stanch competition is apparent. On the one hand, the DBS providers bleat about interference and technical impossibility, and on the other, they seek permission to provide the service themselves. AT&T wants to be eligible as well, but virtually admits that it would not provide a video service that might compete with its cable systems. Their arguments that auctions promote innovation and competition also ring hollow - in this case, where Northpoint is ready to compete today using its innovative technology - auctions will only serve to delay and possibly even destroy, competition and innovation. Finally, their attempt to limit the rollout of this new service to one market initially constitutes yet another thinly veiled attempt at hindering competition.

The Commission should reject all calls for auctions with regard to the frequencies at issue in this proceeding. After more than two years of joint proceedings and successful negotiations with policymakers and Nongeostationary Satellite Orbit-Fixed Satellite

Service ("NGSO-FSS") providers to come up with a technological fix to share the 12.2-12.7 GHz band, Northpoint reasonably expected that its applications would be considered along with the NGSO-FSS applications. At the eleventh hour, the Commission has stripped the Northpoint application from the NGSO-FSS proceeding and placed it in a new proceeding in a different bureau that has now decided to treat Northpoint differently. This administrative shell game is entirely arbitrary and capricious and inconsistent with the Commission's mandate to promote competition and diversity under the Communications Act.

Moreover, Section 309(j)(3) of the Communications Act obligates the Commission to avoid mutual exclusivity and auctions when there are public interest reasons for doing so. What the incumbent MVPDs do not, and cannot, dispute is that significant public interest benefits will flow from the grant of the Northpoint applications. They include:

- Provision of a competitive MVPD service that is virtually certain to provide greater choice, lower prices and improved service;
- Rapid deployment of broadband video and data services, especially to those areas that the Commission has recently found wanting.
- A vast increase in the number of minorities and women with ownership stakes in media properties, which advances Congress' goal of promoting economic opportunity for those individuals.

These public interest benefits are even more important given recent regulatory and judicial actions. The Commission has once again found that there is almost no competition for MVPD service on the local level. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-1 at ¶¶9, 137 (released January 8, 2001) ("*Video Competition Report*"). This situation has been

exacerbated by the recent decision of the D.C. Circuit to find certain limits on cable ownership unconstitutional. *See Time Warner Entertainment v. FCC*, No. 94-1035 slip op. (D.C. Cir. March 2, 2001). The Commission has also recently found that broadband deployment is slow in rural areas and on Native American lands, and that affordable access to broadband services was limited to low income, minority and disabled persons. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, FCC 00-290 at ¶¶221-241 (released August 21, 2000) (*Broadband Deployment Report*). Finally, the D.C. Circuit's recent ruling striking down the Commission's benign new equal employment opportunity rules demonstrates the need for a different mechanism to promote minority ownership and employment in a way that does not raise constitutional questions. *See, MD/DC/DE Broadcasters Association v. FCC*, No. 00-1094, slip op. (D.C. Cir. January 16, 2001).

I. THE COMMISSION SHOULD DECLINE TO HOLD AUCTIONS FOR TERRESTRIAL WIRELESS MVPD SERVICE AND SHOULD EXPEDITIOUSLY GRANT NORTHPOINT'S LICENSE AND WAIVER APPLICATIONS.

While the incumbent MVPDs and other commenters put forth various policy reasons why the Northpoint applications should not be granted and why auctions for terrestrial wireless MVPD licenses should be held, they also recognize that the Commission has the authority to avoid auctions if doing so would be in the public interest. *E.g.*, Pegasus Comments at 19 ("If the Commission decides that a competitive auction for award of the licenses is in the public interest, Pegasus supports the use of the general bidding rules..."). There are several reasons why the Commission should decline to hold auctions here. The first is a matter of equity - for over two years, the Commission treated the Northpoint waiver applications as part and parcel of the NGSO-

FSS proceeding. Just recently and without explanation, the Commission chose to separate the Northpoint applications from the NGSO-FSS proceedings, keeping the NGSO-FSS applicants whole and leaving Northpoint vulnerable to losing everything for which it has worked over the past two years. The second is a matter of law - the Commission is obligated to avoid mutual exclusivity and auctions where, as here, grant of the Northpoint applications easily meets the public interest requirements of 47 USC §309(j)(6)(E).

A. Northpoint Had a Reasonable Expectation that the Commission Would Consider its Application in the NGSO-FSS Proceeding.

In supporting auctions for terrestrial wireless MVPD service, the incumbent MVPD's argue strenuously that the instant case is no different than any other license assignment process, and offer that the Commission should not depart from its "traditional" method of allocating licenses for wireless services. *E.g.*, AT&T Comments at 7-9; DirecTV Comments at 31-33; Echostar Comments at 24-25; NRTC Comments at 8; But apart from the fact that what is at issue here is not a typical allocation of new, unused spectrum, the history of this case demonstrates that this proceeding is far from "traditional."

From the time that it decided to address Northpoint's petition for rulemaking in the same proceeding as Skybridge's petition to provide service in the 12.2-12.7 GHz band, the Commission has treated Northpoint's applications to provide terrestrial wireless service as integrally linked to the proceeding to license NGSO-FSS service on a co-primary basis with DBS service. *FNRPM* at ¶¶3-4; *Notice of Proposed Rulemaking*, 14 FCC Rcd 1131 (1998). This linkage was not merely procedural - in an effort to avoid mutual exclusivity, Northpoint, the sole terrestrial applicant, engaged in long negotiations

with the International Bureau and the NGSO-FSS applicants to work out a technical compromise for sharing the 12.2-12.7 GHz band on a co-primary basis without also harmfully interfering with DBS licensees. At that point, Northpoint surely had a reasonable expectation that its applications would be considered along with the NGSO-FSS applications.

Thus, Northpoint played the spectrum sharing game under the assumption that it would be treated no differently than the NGSO-FSS applicants. Now, over two years later, the Commission has changed the rules. Northpoint's application has now been stripped from NGSO-FSS proceeding and placed in another bureau that shares none of its history. In the absence of a reasoned explanation for this administrative somersault, the Commission's actions are arbitrary and capricious. *Motor Vehicle Manufacturer's Association v. State Farm Mutual*, 463 U.S. 29, 57 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (1970).

B. Auctions are Not Mandated if The Public Interest Would Be Served By Avoiding Mutual Exclusivity.

While Congress enacted 47 USC §309(j) because it generally believed that auctions were the most efficient way to allocate spectrum, it understood that there are times when other public interest considerations would override the desire to have auctions. Thus, Section 309(j) requires the Commission to avoid mutual exclusivity and thereby auctions where the public interest so dictates.

Section 309 (j)(6)(E) states that the nothing in the auction statute relieves the Commission

of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations and other means in order to avoid mutual exclusivity in application and licensing proceedings.

47 USC 309 (j)(6)(E).

The Commission has stated that, under Section (j)(6)(E), mutual exclusivity can be avoided only for those reasons that "further the public interest goals of Section 309(j)(3)." *Implementation of Sections 309(j) and 337 of the Communications Act of 1934*, FCC No. 00-403 ¶21 (released November 20, 2000). But even those reasons give the Commission broad latitude to reject auctions. Section 309(j)(3) describes four public interest goals the Commission is to consider in deciding whether to avoid auctions. They include:

the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.

47 USC §309(j)(3)(A).

promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding concentration of licenses and disseminating licenses among a wide variety of applicants, including...businesses owned by minorities and women.

47 USC §309(j)(3)(B).

efficient and intensive use of the electromagnetic spectrum

47 USC §309(j)(3)(D).

There is no doubt, and in fact none of the commenters dispute, that Northpoint's service would promote each of these public interest goals.⁸ It goes almost without saying that Northpoint's technology, by using spectrum that is also being used by DBS licensees and ten NGSO-FSS licensees, is making both "efficient and intensive use" of the

⁸ The fourth public interest goal in Section 309(j)(3) is recovery of "a portion of the value of the public spectrum resource made available for commercial use" and "avoidance of unjust enrichment." Since no new spectrum is being made available, this section is inapplicable. In any

electromagnetic spectrum. 47 U.S.C. §309(j)(3)(D). And, as discussed in detail in Section II below, grant of Northpoint's applications would promote competition, ensure the rapid deployment of new technologies for the benefit of the public, 47 U.S.C. §309(j)(3)(A), and promote economic opportunity and avoid concentration of licenses by disseminating them to business owned by minorities and women. 47 U.S.C. §309(j)(3)(B).

II. GRANT OF THE NORTHPOINT APPLICATIONS PROMOTES THE PUBLIC INTEREST GOALS OF COMPETITION, INNOVATION, RAPID DEPLOYMENT OF BROADBAND SERVICES AND ECONOMIC OPPORTUNITY FOR MINORITIES AND FEMALES

The incumbent MVPDs posit essentially two reasons why the Commission should not grant Northpoint's applications. The first is that the terrestrial wireless service that the Commission has approved is not technically feasible because it will cause harmful interference to the DBS signal, harming both DBS customers and the companies' reputations. *E.g.*, Echostar Comments at 2-7; DirecTV Comments at 1-4; SBCA Comments at 5-7. The second is that auctions are the best mechanisms for promoting competition, innovation and rapid service to the public. AT&T Comments at 6.

The interference claim is nothing more than a worn out excuse used by just almost every incumbent media industry seeking government protection from competition.⁹ The Commission has already found spectrum sharing in the 12.2-12.7 GHz bands to be feasible, and Congress has commissioned even more tests. But in addition to being transparent, this argument is hypocritical. At the same time that the DBS providers claim that Northpoint's technology will cause insurmountable interference, they are also asking

event, consideration of whether mutual exclusivity is to be avoided in the public interest is not dependent on satisfying every goal set out in Section 309(j)(3).

the Commission for permission to compete for a license to provide MVDDS service.¹⁰

E.g., DirecTV Comments at 28-31; Echostar Comments at 26-28; SBCA Comments at 8-

9. Echostar further compounds the insincerity of its interference claim by requesting that the Commission give DBS providers, *for free*, no less than 250 Mhz of spectrum for DBS licensees in the 12.2-12.7 GHz band to provide these allegedly infeasible terrestrial wireless services. Echostar Comments at 20-30.

The argument that auctions better promote competition and innovation fails similarly. Unlike the usual case where a portion of the spectrum that is lying fallow is put up for auction to encourage innovation and new service, auctions here would have the exact opposite effect - Northpoint has already innovated and is ready to provide terrestrial MVPD service today. Auctions would punish, rather than reward, Northpoint for creating technology that allows spectrum sharing and for being prepared to provide

⁹In any event, the proper place for this argument is not in response to the *FNPRM*, but in a petition for reconsideration of the Commissions *First Report and Order* in this docket.

¹⁰Regardless of how the Commission chooses to allocate licenses for terrestrial MVPD services, under no circumstances should cable operators or DBS providers be eligible. The DBS providers state that they cannot act anticompetitively because they lack market power. Echostar Comments at 26-27; DirecTV Comments at 29. But as the Commission recognizes, its standard for determining whether an eligibility restriction is warranted "involves much more than examining market power." *FNPRM* at ¶298. Parties without market power can act anticompetitively when they have the incentive and the ability to do so. *Id.* Certainly, DBS providers have the incentive and the ability, were they to receive licenses for the terrestrial MVPD service, to use them for purposes that do not directly compete with their DBS service. Pegasus claims that any inclination towards anticompetitive behavior by DBS providers would be cured by a "strong build-out requirement." Pegasus Comments at 18. But a build-out requirement would not prevent DBS from providing noncompetitive services that simply supplement its current high-end service. As for AT&T, it virtually admits that it would use the service in a way that would not compete with its cable service. *See* AT&T Comments at 10-13. But it claims that to leave it out of any auction would "undercut the public interest benefits auctions are designed to achieve," because fewer applicants would lead to lower auction revenues. *Id.* at 10. But Congress prohibits the FCC from setting auction rules based "on the expectation of Federal revenues from the use of" auctions. 47 USC §309 (j)(7).

competition in the MVPD marketplace. And auctions would punish, rather than reward, the public by delaying badly needed competitive broadband services.¹¹

Approval of the Northpoint applications without further delay would provide significant and important public interest benefits. The incumbent MVPDs do not, and indeed cannot, dispute that Northpoint's service will provide badly needed competition in the MVPD market; that it will result in rapid deployment of broadband services in those areas where it is needed most; and that it will vastly increase the numbers of women and minorities participating in media ownership and employment, bringing with it the benefits of editorial diversity, economic empowerment and service to underserved communities that Congress and the Commission have long sought to promote.

A. Northpoint's Service Will Bring Desperately Needed Competition to the MVPD Market Immediately.

For the seventh straight year, the Commission found that MVPD competition on the local level is virtually nonexistent. *2000 Video Competition Report* at ¶¶9, 137 ("The market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry...."). Despite the continued growth of DBS subscribership, there is effective competition - that is, choice of more than one MVPD - in just one percent of all homes served by cable. *Id.* at ¶138

Where there was effective competition, the benefits were manifest. Prices were lower, additional channels were added at no additional cost, new services were more plentiful, and customer service improved. *Id.* at ¶213. Overall, however, in 1999, cable

¹¹ Equally transparent is the insistence that terrestrial broadband MVPD service should be tested in one market to start. DirecTV Comments at 26-27; Echostar Comments at 20-22; SBCA Comments at 7-8. Neither the cable nor the DBS industries were subject to such draconian limits when they commenced service. There is no sound public policy reason not to permit full deployment of MVDDS service from day one.

prices increased faster than the rate of inflation. *Id.* at ¶9. Indeed, since Congress passed the Telecommunications Act of 1996, cable rates have increased at almost three times the rate of inflation. "Cable TV Providers Plug Into Higher Prices," *Monthly Labor Review: The Editor's Desk*, <http://stats.bls.gov/opub/ted/200/oct/wk2/art02.htm>.

Even in the face of this dire need for increased competition among MVPDs, the DBS providers would have the Commission believe that they are the only answer to the MVPD competition problem, and that no other party should be given that chance. Even though DBS penetration continues to grow and although the FCC's recent cable price report suggests that DBS is beginning to serve as a substitute for cable (*i.e.*, in communities where there is high DBS penetration, there seems to be a small statistical relationship between slowing growth in cable subscribership), DBS does not have a price disciplining effect on cable.¹² DBS continues to be a niche market technology that may substitute for cable in the high capacity, high cost market segment and in rural areas. However, it does not compete head-to-head with cable in any broad sense. It makes more sense for cable to raise prices and lose a small market share to DBS than it does to exercise price restraint. That has been true for years and remains true today, explaining

¹²The recent finding that "DBS is a substitute for cable and exerts a small (as shown by the small magnitude of the DBS coefficient) but statistically significant influence on the demand for cable services," should not be interpreted to suggest that DBS disciplines the abusive pricing practices of cable systems. See *Video Competition Report* at ¶¶215-238. Leaving aside the fact that the data is self-reported, self-selected, unaudited data in which forty percent of the respondents left out the key variable (DBS penetration), the data shows no significant effect on cable prices exerted by satellite. As a strict economic proposition, a statistically significant cross price elasticity is a much better demonstration of the substitutability of DBS for cable services. After two decades of relentless cable price increases (except for a short period of regulated price restraint), it should come as no surprise that cable is beginning to approach the limit price set by satellite in an increasing segment of the market, hence the fact that the FCC finally shows a small responsiveness of cable penetration to DBS penetration.

why cable rates continue to rise much faster than inflation at the same time as DBS subscribership grows.

What this means is that the monopoly abuse of cable operators has become embedded and institutionalized in the market. This rip off of consumers is permanent, although its rate of escalation may slow in the years ahead. It will remain until policymakers gain the courage to relieve the public of this cable monopoly tax, or some new technology with costs characteristics that can compete with cable comes along to break its iron grip on the multichannel video programming market.

On the other hand, technological developments may strengthen the hand of cable and reinforce its ability to abuse market power. The roll out of digital cable and the bundling of high speed internet access erode the ability of DBS to compete even in high capacity niche markets. By allowing the cable companies to leverage their market power base in cable into the high speed internet access market, the Commission has all but ensured that the abuse of consumers will continue.

While DBS may one day grow far beyond its 15% MVPD market share to a point where it is truly competitive with cable, the Commission need not, and should not, delay other possible competitors until that day comes. Moreover, DBS itself is a duopoly - what was once four DBS services has now become only two¹³. There is room, and certainly an immediate need, for another competitor that seeks to provide a lower cost, ubiquitous broadband service.

¹³Four companies are licensed by the Commission to provide DBS service, DirecTV, Echostar, Dominion and R/L DBS Company. Dominion provides just 16 video and 16 radio channels in a "self-described Christian and family oriented" service. *Video Competition Report* at ¶64. R/L has not yet commenced service.

If its applications are approved, Northpoint could provide instant MVPD competition to all 210 DMAs in the United States. Because its services are almost certain to be comparable with cable and DBS yet far less expensive, competitors will be pressured to lower their prices. The final result: more choice, better service and lower cost for all Americans.¹⁴

It is important to note that licensing new services such as Northpoint's is one of the few tools that the Commission has to ensure competition in the MVPD market. The D.C. Circuit's recent decision in *Time Warner Entertainment v. FCC*, *supra*, leaves in doubt whether the Commission can use ownership regulation to ensure the presence of more than two MVPD providers nationally. *Id.*, slip op at 10. Opening up the market to new players can promote the Commission's diversity and competition goals without raising constitutional concerns.

B. Northpoint's Service Would Speed Deployment of Broadband Technologies to the Areas the Commission Has Found Most Wanting.

Congress has repeatedly and explicitly emphasized that one of the Commission's core goals post-Telecommunications Act of 1996 is to encourage the "rapid deployment of new telecommunications technologies." *Telecommunications Act of 1996*, Pub.L.No. 04-104, 110 Stat. 56 (1996), preamble. As discussed above, Section 309(j)(3)(A) commands that the Commission avoid mutual exclusivity if to do so would lead to "the development and rapid deployment of new technologies, products, and services for the

¹⁴Moreover, to the extent that Northpoint's service can aid DBS providers by providing a full complement of local over-the-air television stations to each market, the service can make DBS providers more competitive as well. *Video Competition Report* at ¶140 (Carriage of local broadcast signals and changes in DBS operators marketing strategies "are likely to make DBS even more viable as a competitor to cable.")

benefit of the public, including those residing in rural areas,..." And Section 706 of the Telecommunications Act of 1996 requires the Commission to:

Encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment.

47 USC §157 note.¹⁵

As part of its mandate under Section 706, the Commission is to monitor the deployment of broadband services and report to Congress annually. In its latest report to Congress, the Commission concluded that as a general matter, that deployment of advanced telecommunications services, particularly DSL services and cable services, is "reasonable and timely at this time." *Broadband Deployment Report*, cite at ¶204.

However, when the Commission looked at certain segments of the population, its assessment was not as positive. It concluded that because of the limitations of the two principal broadband technologies and the costs associated with bringing them to sparsely populated areas, "many rural customers are particularly vulnerable to not receiving access to advanced services..." *Broadband Deployment Report* at ¶¶221-223.

The Commission's assessment was even more negative in the context of Tribal lands, stating that "[t]he lack of even basic infrastructure and access to phone services in many such territories...may present particular challenges to the deployment of advanced services." *Broadband Deployment Report* at ¶224. While the Commission found that

¹⁵"Advanced telecommunications capability" is defined "without regard to any transmission, media or technology, as high speed, switched, broadband telecommunications capability that enables users to originate and receive high quality voice, data, graphics, and video telecommunications using any technology." *Id.*

59% of zip codes had access to broadband services nationally, only 44% of zip codes in Indian territory did so. *Id.*

While rural residents and Indians suffered from lack of any access to advanced services, the Commission found that other populations lacked *affordable* access to such services. Low income consumers, minority populations and persons with disabilities were among those with lower than average access. *Broadband Deployment Report* at ¶¶234-241.

Approval of Northpoint's applications would go a long way towards repairing this broadband "divide." Northpoint's technology can provide broadband service in even the most remote areas, and its lower cost is almost certain to make broadband access more affordable. Should the Commission thwart Northpoint's attempts to deploy broadband services by instituting auctions for terrestrial MVPD licenses, it would run contrary to Section 706's mandate that the Commission "utiliz[e]...regulatory forbearance, measures that promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment" to encourage broadband deployment.

B. Northpoint's Service Will Significantly Increase Minority and Female Ownership and Employment in the Media.

Congress has also expressed an intent that the Commission should, in allocating licenses, ensure that minorities and women are given the opportunity to secure licenses. Under Section 309(i), Commission is required to give a "significant" preference to any applicant controlled by a member of a minority group when granting a license by random selection.¹⁶ And, as discussed above, Section 309(j)(3)(B) requires that the Commission

¹⁶After July 1, 1997, Congress amended Section 309 to allow random selection only in the case of

consider whether avoidance of mutual exclusivity will lead to "economic opportunity and competition....by the disseminating licenses among a wide variety of applicants, including...businesses owned by minorities and women." 47 U.S.C. §309(j)(3)(B).

Grant of the Northpoint applications would fulfill this goal in a spectacular fashion. The vast majority of Northpoint's 69 Broadwave affiliates minority and female owned. For example:

- Women and minorities constitute 80% of all participants in the 69 Broadwave local license applicant groups;
- Women and minorities control or have substantial equity participation in the majority of the top media markets, including:
 - Nine of the top ten markets
 - Eighteen out of the top twenty markets
 - Twenty-three out of the top thirty markets

Moreover, of the minorities represented in the Broadwave affiliates, African Americans make up 38%, Latinos make up 6%, Asian Americans make up 4%, Native Americans 3.4% and women 32%.

The kind of infusion of minority and female participation in media ownership and operation that Northpoint would provide is especially critical at this point in time. A recent report by the Department of Commerce demonstrates that a number of factors, including vast increases in consolidation caused by the lifting of broadcast ownership limits in the Telecommunications Act of 1996 and the demise of several Commission policies intended to promote minority ownership and employment in the media, have

noncommercial stations. However, the FCC has decided to choose noncommercial licensees through a point system instead. *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCCRcd 7386 (2000).

conspired to drive minority ownership of television stations down to a level below that of 1990. *Changes, Challenges and Charting New Courses: Minority Commercial Broadcast Ownership in the United States*, National Telecommunications and Information Administration at 45-46 (December 2000) ("*Minority Broadcast Ownership Report*"). Minorities currently own just 23, or 1.9% of the 1288 licensed broadcast television stations operating in the United States. *Minority Ownership Report* at 45. This is *six stations fewer* than minorities owned in 1990. *Id.* The total number of owners also decreased - from 16 to 12 between 1998 and 2000. *Id.*

It is well established that consolidation of media properties most negatively impacts minorities. Consolidation drives up prices for media properties, and minorities traditionally have the least access to the kind of capital needed to compete for them. *Minority Broadcast Ownership Report* at 32. Also, to the extent that most minority owners own single properties in a market, they cannot compete with multiple owners for advertising revenues. *Id.* at 40. As a result, they are often forced to sell their properties, which leads to greater consolidation and higher prices.

The virtual elimination of Commission policies that sought to promote minority ownership and employment in media is equally to blame for the decrease in minority ownership. While Congress, the Commission and the Courts have all stated their support for the goals of minority ownership of the media, namely, service to underserved communities, promotion of editorial diversity and economic empowerment, there is little agreement as to how best to further those goals. *E.g., Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990)(finding Commission's distress sale policy constitutional

because "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective"); *see* discussion above at 17.

Indeed, it appears that even the most benign government regulatory policies to promote economic opportunity for minorities and females are at risk in the current political and judicial environment. The Commission's latest version of its equal employment opportunity rules, which simply required broadcasters to make efforts to recruit minorities for employment, were held to be unconstitutional by the D.C. Circuit. *See MD/DC/DE Broadcasters Association v. FCC*, No. 00-1094, slip op. (D.C. Cir. January 16, 2001). The Northpoint application provides an opportunity for the Commission to promote minority ownership and employment and its benefits without reliance on disfavored regulatory mechanisms.

CONCLUSION

The incumbent MVPDs have not made either a legal or an equitable case for auctions for MVDDS licenses. Their technical and policy arguments appear to be poorly masked pleas for inappropriate use of auctions to delay and possibly thwart the growth of MVPD competition.

Under the Congressional directives of the Telecommunications Act of 1996, promoting competition, innovation, rapid deployment of broadband services and economic opportunity for different voices are the Commission's top priorities. If, as is the case here, auctions would frustrate those goals, the Commission must not initiate them.

The Commission should grant the Northpoint waiver applications expeditiously to permit it to commence competitive terrestrial MVPD service. Any further delay is contrary to the express intent of Congress and the public interest.

Respectfully submitted,

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